1997

C. Stan Derbidge v. Mutual Protective Insurance Company : Reply Brief of Appellant

Utah Court of Appeals

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IN THE COURT OF APPEALS OF THE STATE OF UTAH

C. STAN DERBIDGE, Personal Representative of the Estate of ESMA S. SEYMOUR,

Plaintiff and Appellant,

vs.

MUTUAL PROTECTIVE INSURANCE COMPANY, a Nebraska corporation,

Defendant and Appellee.

97-0338-CA

Court of Appeals
Case No. 970034-CA

District Court
Case No. 930901096CV

Priority No. 15

REPLY BRIEF OF PLAINTIFF/APPELLANT C. STAN DERBIDGE

APPEAL FROM THIRD DISTRICT COURT HONORABLE LESLIE A. LEWIS, PRESIDING

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ARGUMENT

Failure to disclose -

Defendant Mutual Protective Insurance Company (MPIC) asserts:

> It is undisputed that in the application Mrs. Seymour failed to disclose her significant medical history of progressive mental impairment and mental confusion and her diagnosis of probable organic brain syndrome, including her hospitalization for memory impairment in 1985. Mrs. Seymour also failed to disclose that she was hospitalized again in 1988 for chest pain .... (Appellee's Brief, at 7).

In fact, Mrs. Seymour did disclose in the application the fact that she suffered from high blood pressure (Record, at 28, No. 3; Appellant's Brief, Addendum 3, No. 3), which was the basis, according to the affidavit of her doctor, for the hospitalization in 1985 with respect to memory impairment. (Record, at 116). The condition of high blood pressure may also have been the underlying reason, at least from her point of view, for the hospitalization for chest pain in 1988.

The question in the application concerning hospitalization only inquired concerning confinement for conditions other than those for which response had already been given in previous questions. (Record, at 28, No. 5; Appellant's Brief, Addendum 3, No. 5). Mrs. Seymour had answered, in Application Question 3, that she had high blood pressure, for which she had been hospitalized, and thereby, with that response, included the answer to the hospitalization inquiry of Application Question 5. The information she provided was in accordance with the opinion of her doctor, at least until the final diagnosis, of which she

was unaware. (Record, at 116). In other words, Mrs. Seymour did not "fail to disclose" her medical history to the insurer. She did disclose her history, based on her own knowledge of her condition, which is all that the insurer and its agent asked of her in the application process. (Record, at 29, No. 10; Appellant's Brief, Addendum 3, No. 10).

The phrase "failed to disclose" (Appellee's Brief, at 7) could be interpreted to mean simply the failure to include and transmit all of the information that the insurance underwriter would have liked to have received for the evaluation of the risk. To this allegation, Mrs. Seymour might have responded that she answered the insurer's questions truthfully. If desired information was missing, it was the fault of the insurer and its agent. It was not her responsibility to divine the true intent of the drafter of the contract or the desires of the insurance underwriters. If they had wanted more specific information, they could have asked more specific questions.

However, the phrase "failed to disclose" (Appellee's Brief, at 7) could also be interpreted to mean that Mrs. Seymour intentionally and deliberately withheld information, lying to the company and its agent to induce the issuance of the insurance policy. This, of course, the Plaintiff categorically denies, and MPIC has no evidence to support such a contention or implication. An inference of this type of conduct on the part of Mrs. Seymour must not be drawn in this case. However, Mr. Derbidge suggests that it would be just such malevolent behavior for which the

statute in question (U.C.A. 31A-21-105) was intended, for the very purpose of allowing rescission of contract to protect the insurer in such a case.

Redundancy of statutory provisions -

Mr. Derbidge contends that U.C.A. 31A-21-105 affords the escape of rescission to the insurer only for cases of "misrepresentation," defined in Utah as knowledgeable misstatement of fact. (Appellant's Brief, at 13-15). On the basis of such misrepresentation, the insurer may then rescind <u>if</u> it has relied on the error which is either material or made with intent to deceive, <u>or</u> the error has contributed to the loss. (Appellant's Brief, at 14; Addendum 1). MPIC suggests that this position is "untenable," (Appellee"s Brief, at 8) as the interpretation would include the requirement of knowledge of the applicant twice, first at the initial definition of misrepresentation, and secondly at the option, or "prong" of "intent to deceive". The statutory language of "intent to deceive", it is further suggested, would therefore be rendered "redundant," meaningless, and not in accord with principles of statutory construction which require that due effect and harmony be given, if at all possible, to all statutory provisions. (Appellee"s Brief, at 8-9).

While statutory harmony may be an elusive goal with some legislation, Mr. Derbidge contends that there is no difficulty with this statute when construed according to his interpretation,

which affords the additional advantage of "harmony," rather than dissonance, with the Common Law of Utah.

MPIC further suggests that there is no basis for a distinction between a "knowing" misrepresentation and one that is "fraudulent." (Appellee"s Brief, at 9, note 2).

In fact, the statutory history (See Appellee's Brief, at 9, note 3) shows that the prior statute provided for rescission relief for misrepresentation that was "fraudulent." (U.C.A. 31-19-8 (repealed 1986). The new statute, U.C.A. 31A-21-105(2), substituted the phrase "intent to deceive" for the same effect. The point is that the level of knowledge required for "intent to deceive" may be interchangeable with "fraud," but not necessarily with that required for a knowing misstatement, or "misrepresentation."

The effect of MPIC's assertion would be that there would be no difference between a simple error of fact and one made with knowledge of the true condition. Knowledge, however, does not necessarily include fraud, or intent to deceive. An applicant may have known of a condition or occurrence, but have forgotten, as is often innocently the case when someone tries to reconstruct a health history over a period of several years. Or, he may assume that a condition would be considered as "de minimis," as is often actually the case. Nevertheless, a misstatement, on the basis of such knowledge, could be considered a misrepresentation. However, when the applicant has no knowledge, no knowledge at all, the Utah Courts have always held that statements made on

that basis, or lack thereof, do not constitute misrepresentation. (Appellant's Brief, at 13-14).

The distinction between these levels of knowledge is emphasized in MPIC's own policy, in the language reflective of statutory provisions which govern contestability of the contract. Part K(2) of the policy (Record, at 50-51; Appellee's Brief, at 3-4) provides that after two years from the policy date only fraudulent misstatements may be the basis for rescission, but not other misstatements, even though knowledgeably made, which do not rise to the level of fraud, or intent to deceive.

U.C.A. 31A-21-105 can meaningfully accommodate, without redundancy, the long-standing interpretation of Utah Courts that only knowledgeable misstatements constitute misrepresentation.

Construction of Statutes at variance with Common Law

One of the classic rules of statutory interpretation is that provisions in derogation of the Common Law are strictly construed. This was cited by Appellant (Appellant's Brief, at 12) and acknowledged by the Court below. (Record, at 159). Appellee correctly points to an old provision of the Utah Code, U.C.A. 68-3-2, (Appellee's Brief, at 10) which states that this rule of construction will not apply in Utah, and that all statutes will be liberally construed to effect their intent and to promote justice. This provision has been acknowledged by the Utah Supreme Court, both in the breach, and the observance. Nevertheless, the Utah Courts still retain the obligation to

interpret the statutory provisions of the Legislature. When a statute is clearly drafted, it may be liberally construed to effect its intent. If ambiguous, the statute must be interpreted carefully, perhaps strictly, to effect its application. In interpreting then-section 2489, Comp. Laws 1907, the Supreme Court offered this comment:

> In arriving at the true meaning of a particular section, it is not only permissible, but very often necessary, that all the provisions of the act of which the particular section forms a part be considered, as well as the object or purpose of the lawmaking power in adopting the entire act as passed. True it is that the language employed by the Legislature must first be considered, and, if this is unambiguous and direct, it must ordinarily be given full force and effect. When, therefore, a forfeiture of a pre-existing right is claimed by reason that a particular clause or section of an entire act has not been literally complied with, and when the statute does not in terms or by unavoidable implication declare that the failure of a strict compliance shall work a forfeiture, the courts may well pause before declaring a forfeiture by reason that all the provisions of the act have not been literally complied with. (Pool v. Utah County Light & Power Co., -- Utah --, 105 P. 289, 291, (1909))

Whether the statute is construed strictly or broadly is perhaps only of semantic importance for this case. The purpose of the statute is to protect the public from overreaching insurers and the business of insurance from dishonest applicants. This regulation was first attempted by the Courts and later by the Legislature, for the same purpose. In this case, where the definition of misrepresentation was settled in the Common Law of Utah (Appellant's Brief, at 10-12) and not specifically changed by the statute, it would not diminish the full effect of the legislation to retain the earlier definition in the interpretation of the statute. In addition, it is a tenet of the

law that forfeiture of insurance is to be avoided, if possible. Accordingly, in order to effect a rescission on the basis of a misstatement, or misrepresentation, in the application for insurance, the insurer would need to adduce evidence that the misrepresentation was knowledgeably made by the applicant. This is a reasonable interpretation, protective of both the public and the insurers, and avoids unnecessary rescission, or forfeiture, of insurance coverage. While the minority view, it is the law of several other jurisdictions, including California, Idaho, and Colorado. (Record, at 99).

Terms of the application -

The terms of the policy include both the wording of the application, insuring provisions, and the standard provisions required by law, which include such terms as limitations on the period of contestability. To the extent that they are in conflict, the insured should be entitled to the provisions of the contract. The language governing contestability is a minimum standard, provided by the Legislature for the protection of the public. If an insurer decided to abbreviate the contestable period to one year, or to six months, or to forgo it altogether, it could do so. If it wanted to hold the applicant only to statements made with knowledge, it could also do that.

Mr. Derbidge maintains that this is what MPIC has, in fact, done. Mrs. Seymour was asked to respond in the application only to "the best of her knowledge." (Record, at 29, No. 10;

Appellant's Brief, Addendum 3, No. 10). Accepted rules of contract construction provide that provisions of coverage in insurance contracts be broadly construed in favor of the insured and terms of exclusion be given a narrow interpretation, for the same purpose of protecting the public from insurer misconduct. Either way, with respect to ambiguous provisions, the insured receives the benefit of the doubt. (Record, at 100; Bergera v. Ideal National Life Insurance Co., 524 P.2d 599, 600 (Utah 1974)).

In this case, in determining whether the reference to knowledge is a material and beneficial provision of the contract, or only a provision of "certification," as MPIC asserts, (Appellee's Brief, at 12) the applicant is entitled to receive a broad interpretation, the benefit of the doubt, and to receive the advantage of the face value of the terms of the agreement. If the contract said that the applicant should answer only to the best of her knowledge, that should be what it means. Since Mrs. Seymour complied with the provisions, she should have received the promised insurance protection.

In drafting an agreement, the insurer does so at the peril of being held to its terms and the insuring public is fairly entitled to that protection. In this case, without evidence of knowledgeable misstatement, the insurer is obligated to extend the insurance benefit to which it agreed and on which the applicant relied.

CONCLUSION

Summary Judgment should be allowed only when there is no issue of contested fact. (Appellant's Brief, at 4-5). In this case, the proper interpretation of the Insurance Code and the knowledge of Mrs. Seymour as she applied for the policy are salient points at issue. Mr. Derbidge should be entitled to present his case, and to have these issues determined at trial.

Respectfully submitted this 19th day of August, 1997.

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CERTIFICATE OF SERVICE

I, Christian S. Fonnesbeck, certify that on 19 August 1997 I served copies of the attached REPLY BRIEF OF PLAINTIFF/APPELLANT C. STAN DERBIDGE upon David B. Watkiss, Carolyn Cox, and Brett J. DelPorto, counsel for the appellee in this matter, and upon co-counsel Thomas R. King, by mailing copies to them by first class mail with sufficient postage prepaid to the following addresses:

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